Supreme Court, U. S.
FILED
APR 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1099

LORENZA SHORT,

Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

HENRY J. ROSENBAUM
Polasky, Meisel, Rosenbaum
& Meyer
141 Harrow Lane
Saginaw, Michigan 48603
Telephone: (517) 793-9960

JEROME E. BURNS
Attorney at Law
4371 State Street
Saginaw, Michigan 48603

Attorneys for Petitioner-Appellant.

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1099

LORENZA SHORT,

Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REPLY

The government response, by addressing itself to points other than the essential one being raised, proves the defendant's contention; that he has never received a judicial review and response directed to the sole point on review—that he has been denied his constitutional right of confrontation.

The essence of the government brief merely repeats the claim that there is sufficient evidence from which a jury may base a finding of guilt. That is not, and never has been, the question on appeal. The defendant's sole point is that his basic constitutional right of confrontation was denied when he was refused the opportunity to cross-examine his spouse on her terribly damaging

and inculpatory statements which were presented to the jury, and therefore, the government then has the burden of proving, beyond a reasonable doubt, that the evidence admitted without confrontation could not have contributed to the conviction. *Chapman v. California*, 386 U.S. 18. This burden the government has clearly failed to carry, nor has it ever claimed to have met such standards.

The Evans testimony, as to statements of Mrs. Short of her (Mrs. Short's) communications with the defendant, Mr. Short, could serve no purpose whatsoever to establish any point except the improper one of Mr. Short's participation in the preparation of and furnishing information for the deficient returns, a clearly impermissible hearsay. This testimony was knowingly submitted by the prosecution for this improper purpose. There would be no other reason for including the extrajudicial statements of Mrs. Short in the Evans testimony and the government has suggested none. The defendant was unquestionably denied both the opportunity to cross-examine the maker of the statement—his wife—and the mandatory minimum benefit, despite repeated requests, of a jury instruction to limit the serious prejudice contained in the wife's extrajudicial statements.

The single justification urged by the government for use of the third party statements is that the wife's extrajudicial statements are not "hearsay". This continues to beg the question which is the constitutional right of the defendant to cross-examine the maker of the incriminating statements whether or not the statement is technically categorized as "hearsay". Even if it can be assumed that the Evans testimony is for any reason admissible, it is still a statement of Mrs. Short presented to the jury without instructions and without meeting the standards of *Dutton v. Evans*, 400 U.S. 74, on which the government apparently relies. It must be reviewed in the light of rules of "confrontation" and not merely on rules of "admissibility". The first is the question raised in defendant's appeal; a matter of individual constitutional rights. The second is a mere diversion to a subordinate or preliminary question of evidentiary admissibility.

It is noteworthy that the government's brief does not contest the law as cited in petitioner's brief.

RELIEF REQUESTED

The essential question which the Sixth Circuit Court of Appeals has failed to consider is whether the defendant was entitled to confrontation of the maker of the statements presented to the jury, i.e. Mamie Short, or whether in all such cases the third party's statements may be placed before the jury while confrontation of that third party is denied. Certainly the impermissible purpose for presenting the third party statements to the jury and the prejudice resulting therefrom far outweighed any potential for admitting the third party statements incidental to Mrs. Evans' testimony. Either the defendant was entitled to confrontation of the maker of the objectionable statement or the Court of Appeals ought to have set forth its standard whereby an incriminating statement of a third party may be presented to the jury without instruction and not constitute a denial of confrontation, not only in this case but in all others as well. Where, as here, the lower courts have failed to address the issue, the defendant has not effectively received judicial consideration of his case. To paraphrase a well known saying, "justice ignored is justice denied". Defendant, therefore, requests that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit, or in lieu thereof, that this case be returned to said Court with instructions to fully address the issue of defendant's right to confrontation under the factual circumstances of this case.

Respectfully submitted,

HENRY J. ROSENBAUM
Polasky, Meisel, Rosenbaum
& Meyer
141 Harrow Lane
Saginaw, Michigan 48603
Telephone: (517) 793-9960

JEROME E. BURNS
Attorney at Law
4371 State Street
Saginaw, Michigan 48603
Attorneys for Petitioner-Appellant